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HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 321

BRADLEY MINING CO., a corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's brief in opposition ignores completely the merits of the Petition for Writ of Certiorari despite the fact that the petition presents a situation which has been termed "a very thin case * * * whipped into a monstrosity" —posing "an important federal question relating to the function of a trial judge"—in which "both the trial judge and the judges of this [circuit] court have simply refused to function."[1]

1. See Judge Pope's comments Appendix A, p. 18; Appendix C, pp. 3, 5 (opinion rendered after remand by this Court).

Respondent argues that this proceeding is limited to matters subsequent to the issuance of this Court's mandate and that the Court of Appeals complied with the mandate. We submit that neither of these comments is supportable.

CONSIDERATION OF MERITS NOT FORECLOSED

The principal point made by respondent is that this Court having granted certiorari (without limitation) and reversed the order of the court below denying a hearing en banc, without consideration of the merits, a second petition for certiorari to review the decision on the merits is foreclosed. What respondent has neglected to notice is that the rule relied upon is the rule which applies only when, upon the first appeal, the merits are passed upon.[2]

It is readily apparent that in the case at bar this Court did not pass upon the merits. If it had, and the meaning of its decision is that upon the merits the Court of Appeals for the Ninth Circuit was in error and was reversed, then that court has not complied with the decree of this Court, for rather than deny the hearing en banc the judgment of the District Court should have been reversed. Upon the other hand, if the meaning of this Court's decision were that on the merits the judgment below was correct, then its order vacating denial of the petition for hearing en banc and directing that it be considered in the light of the

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2. The procedure relating to certiorari was established by the Act of March 3, 1891. Most of the authorities cited by respondent were decided long prior to the Act. Respondent's cases determined since 1891 are not in point, as in those cases this Court had actually passed upon the merits.

Western Pacific Case[3] was worse than an idle act, it was a contradiction in terms, because if the merits had been passed upon by this Court and no error were found there was nothing which the court below could do either en banc or otherwise.

The fact is that the decision of this Court was not on the merits, but on a matter of procedure and the actual holding was that the court below, in its denial of the petition for hearing en banc, had so far departed from the proper course of proceeding that its order must be vacated and the petition set at large, undetermined. In this posture the case was not ripe to be presented for review until the petition for hearing en banc was properly passed upon and, through the avenues of proper procedure denied or granted, in which event, if a hearing en banc were had, the questions on the merits which were presented might well disappear by a reversal of the judgment by the court sitting en banc. In the circumstances this Court was not in position to pass on the merits and did not pass on the merits.

The precise question presented has not been presented before for the simple reason that the matter decided in the *Western Pacific Case* and this case—the appropriate procedure to be pursued when an application was made to the United States Court of Appeals for hearing en banc,—was an entirely new question. But analogies are provided. In *Honeyman v. Hanan,* 300 U.S. 14, this Court remanded a cause to a state court for further proceedings to the end that uncertainty might be removed and the precise nature

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3. Since the action of this Court in 345 U.S. 247, the Western Pacific Railroad Corporation has recently filed its Petition for Writ of Certiorari (No. 441—October Term, 1953—filed October 26, 1953.).

of a claimed federal question, and how it arose, disclosed, i.e. for the court below to complete its functions. After further proceedings in the state court the matter again came before this Court in *Honeyman v. Hanan,* 302 U.S. 375, where the appeal was dismissed, not because the merits had been passed upon but because, on a clarification of the record, it appeared that the claimed federal question was not substantial. In *Railroad Commission v. Maxcy,* 281 U.S. 82, this Court set aside a decree and remanded the cause with directions to make findings of fact and conclusions of law and then enter a decree thereon. This was done and this Court then assumed jurisdiction of the cause and affirmed the decree in *Railroad Commission v. Maxcy,* 282 U.S. 249. *United States v. Archer,* 241 U.S. 119, 132, was remanded "for more particular findings" and was then affirmed by an equally divided court in *Archer v. United States,* 251 U.S. 548.[4]

The only thing this Court's mandate in the case at bar did was to direct the court below **properly** to complete its functions by proper disposition of the petition for hearing en banc. Not until then would its decision be final and ripe for review. The mandate said nothing of the merits. The petition here is not to review a decision rendered on the mandate but one rendered before the mandate, not touched upon in the mandate—which set the merits at large by re-

4. To the same effect *Fidelity & D. Co. v. United States,* 259 U.S. 296, affirmed, after further proceedings below, in *United States v. Fidelity & D. Co.,* 266 U.S. 587; *Fox v. Gulf Ref. Co.,* 295 U.S. 75, and *Gulf Ref. Co. v. Fox,* 297 U.S. 381; *United States v. Ballard,* 322 U.S. 78, and *Ballard v. United States,* 329 U.S. 187 (where this Court reversed because it did not have the benefit of the views of the court below on a question involved and on learning those views disagreed and reversed again).

instating the petition for hearing en banc—and to review action below which, we submit, failed to comply with the mandate. The court below "may consider and decide any matters left open by the mandate of this Court" and these matters may be reviewed on new proceedings in this Court. In re *Sanford etc. Co.*, 160 U.S. 247.[5]

PROCEEDINGS BELOW AFTER MANDATE

We submit, as above, that not only are the merits before this Court, by virtue of the petition, but also that the Court below did not comply with the decision of this Court in the *Western Pacific Case.*

Prior to the *Western Pacific* decision, it had been the practice of the Ninth Circuit either to strike a petition for rehearing en banc or for the panel which heard the case to dispose of such petitions without any circularization of the petition among the active members of the Court. We submit that all the Court below has done by its amended Rule 23 has been to formalize its earlier practice which was held to be improper by this Court. It is the plain miscarriage of justice demonstrated in the case at bar which points up the vice of a rule *conditioning* consideration of a hearing en banc on the granting of a rehearing by the division which decided, improperly as we believe, the case on the original hearing in the division. This point was clearly made in the pending petition (p. 18, et seq.) and respondent in the brief in opposition has simply refused to meet the issue.

Further discussion here would only repeat what was said

5. Cf. *Hinckley v. Morton*, 103 U.S. 764; *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562; *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168; *Transparent-Wrap. etc. Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 648.

in our petition, except that it can be added that Judge Pope, in his dissent in the *Western Pacific Case,* after remand of that case to the Court of Appeals, points out that the Court's new Rule 23 has precisely the improper confining condition that we have noticed (see Petition for Certiorari filed by Western Pacific Railroad Corporation in this Court, October 26, 1953—No. 441 October Term 1953—at p. 9).

Since the above mentioned petition of the Western Pacific case has been filed in this Court, we think it would be improper for us to comment on what happened in that case – a statement of what occurred and comments thereon are properly for counsel for the petitioner in that case.

Respondent's brief in opposition does not attempt to meet the point raised in the pending petition, page 20 et seq. —emphasized in Judge Pope's second dissent (Appendix B) which went upon the ground, in effect, that under a proper rule which called the matter to the attention of the majority of the Court—a hearing en banc would properly have resulted, because, in his view, on a rehearing en banc the judgment would be reversed. See Appendix B, p. 3:

> "• • • my views are based upon the demonstrable probability that were this case heard by all seven judges, a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F.2d 926, (1951), will disclose why I think it is evident that a hearing in bank would produce a different result."

Nor has respondent attempted to meet the remaining questions raised in the petition at bar. In view of the result which Judge Pope has termed "a monstrosity" (Appendix A, p. 18), in his third dissent he states, "The question is

whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment * * * it poses an important federal question relating to the function of a trial judge * * * As I see it, both the trial judge and the judges of this [circuit] court have simply refused to function." (Appendix C, pp. 3, 5.)

In the above connection, see the pending petition p. 21 et seq.

CONCLUSION

We respectfully submit that this Court should issue its writ of certiorari as prayed.

Dated: November 2, 1953.

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